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No. 04-5928

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN,
Petitioner,

v.

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF FOREIGN SOVEREIGNS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER JOSE ERNESTO MEDELLIN

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INTEREST OF AMICI CURIAE[1]

The United States is a party to the Vienna Convention on Consular Relations[2] and the Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes.[3] Article 36 of the Convention requires authorities who detain a foreign national to notify the detained person without delay of the right to contact consular officials and requires the authorities, if requested, to notify consular officials of the detention. The Optional Protocol grants enforcement powers to the International Court of Justice ("ICJ") and makes it the compulsory forum for resolving disputes on matters related to the Convention between nations that have adopted the Optional Protocol.

Texas authorities arrested, tried, convicted, and sentenced 18-year-old Jose Ernesto Medellin without ever providing him the notice required by Article 36, even though Medellin told those authorities, when they first arrested him, that he was born in Mexico. Mexico commenced the *Case Concerning Avena and Other Mexican Nationals* (*Mexico v. U.S.*) (Order of March 31, 2004), *available at* http://www.icj-cij.org/ [hereinafter "*Avena*"], to seek redress for the Texas authorities' actions in Medellin's case and for various U.S. state authorities' similar failures to notify Mexican nationals about their rights in 53 other capital cases. The ICJ ruled that Texas authorities violated Article 36 in Medellin's case by not notifying him about the right to speak with a consul once

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Counsel for Petitioner and Respondent have consented in writing to the filing of this brief *amicus curiae*.

[2] April 24, 1963, 21 U.S.T. 77 [hereinafter "Vienna Convention" or the "Convention"].

[3] April 24, 1963, 21 U.S.T. 325 [hereinafter "Optional Protocol"].

they had reason to believe he was a Mexican national. In Medellin's case, as in the 50 other instances where it found Article 36 violations, the ICJ ordered U.S. courts to review his conviction to determine, without regard to procedural default doctrines, the violation's effect on the proceedings that led to his death sentence.[4] The Court of Appeals held that its prior decisions and decisions of this Court precluded it from following the ICJ's holding in *Avena*. Now, Medellin petitions this Court for certiorari to determine whether U.S. courts must follow *Avena*.

Amici nations have an immediate interest in Medellin's petition. Each *amicus* has adopted the Convention and each has a vital interest in seeing that U.S. law-enforcement authorities comply with the Convention and furnish a legal remedy for treaty violations. *Amici* have thousands of their nationals present in the United States and must ensure that those nationals receive the consular protection and support envisaged by Article 36. *Amici*, through their consuls in the United States, rely on the notice provisions in Article 36 to ensure that *amici* can provide speedy and effective assistance when federal, state, or local authorities detain one of their nationals. Without notice under Article 36, detained nationals often lose the benefit of consular assistance in criminal proceedings.

When U.S. authorities violate the Convention, *amici* have a further interest in seeing that U.S. courts apply a remedy that restores the benefits of Article 36, because consular intervention can affect the outcome of criminal proceedings. Consuls have an obligation to assist and ensure fair treatment of their nationals who become entangled in another state's criminal-justice system. In death-penalty cases, consuls can assist in obtaining mitigating evidence from the home country; the accused might otherwise lack access to such evidence. Several *amici* have nationals on death row in the United States.[5] Because of the death penalty's severity, these *amici* have a particular interest in ensuring that nationals on death row receive redress for any prejudicial effect that a treaty violation had on their defense.

[4] In *Avena*, the Mexican government sought relief for 54 nationals convicted in capital cases. The ICJ held that authorities in the United States violated Article 36 in 51 of those cases. *Avena*, ¶¶ 106(1)-(2); 153(4).

More generally, *amici* nations have an interest in reciprocal compliance with international obligations. This includes abiding by the ICJ's judgments if a country has agreed by treaty to do so. In this case, the United States signed the Optional Protocol, which requires compliance with the ICJ's judgment in *Avena*. The ICJ can function effectively as a forum for peacefully resolving disputes only if *all nations* abide by its judgments in cases where they have a treaty-based obligation to comply. The reciprocity principle applies equally to the consular system codified in the Vienna Convention. In the long term, countries will not provide foreign nationals with consular notice under the Convention if the same protection is not accorded to their own citizens abroad.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the past, the United States has formally protested detention of its nationals without consular notice, even when the detention lasted for only 32 hours.[6] Then as now, the United States recognized that a consul may provide critical assistance to nationals detained in another country's criminal-justice system. Vienna Convention Article 36 makes that assistance possible by requiring that local authorities notify the detained

[5] The Death Penalty Information Center lists on its website each country that has a national on a U.S. death row and the total number of nationals on death row for each of those countries. Death Penalty Information Center, *Foreign Nationals and the Death Penalty in the United States* (last modified July 15, 2004), *at* http://www.deathpenaltyinfo.org/.

[6] *See* LUKE T. LEE, CONSULAR LAW AND PRACTICE 145-49 (2d ed. 1991) [hereinafter "CONSULAR LAW"].

person of the right to speak with a consul. Such notice can affect the outcome of criminal proceedings. Consular assistance may take many forms, including helping to select counsel, urging prosecuting authorities to seek a reduced penalty, collecting evidence (including substantial mitigating evidence) from the home country, and monitoring proceedings.

This Court should grant Medellin's Petition and order review of his case for several reasons. First, the pattern of treaty violations by local authorities in the United States, which deprives foreign defendants of consular assistance, establishes a dangerous precedent, because Article 36's vitality worldwide depends on reciprocity. If jurisdictions in the United States continue to deny detained foreign nationals notice under Article 36, and if U.S. courts fail to provide a remedy for that denial, other nations may follow suit. As the United States Department of State has recognized in its guidelines to local authorities, vigorous domestic adherence to Article 36 helps guarantee that U.S. nationals will receive the same treatment abroad. The United States insists on consular notice for its citizens when authorities in other countries detain them, and it has protested denial of, or minor delays in, consular access or notice.

Second, the ICJ's *Avena* judgment now requires U.S. courts to consider the effect of the treaty violation—denying the consular notification the United States insists upon for its own citizens—in Medellin's case. The proceedings that resulted in the *Avena* judgment took place under the Optional Protocol, which selects the ICJ as the compulsory forum for resolving disputes between states that have adopted the Protocol, as both the United States and Mexico have. The Protocol's plain language requires adherence to the ICJ's judgment.

Third, the United States should adhere to the ICJ judgment for another reason: the United States uses the ICJ to air

international grievances. The United States has commenced ten cases before the ICJ.[7] Most significantly, after the take-over of its Tehran embassy in 1979, the United States commenced the first action ever to invoke the ICJ's compulsory jurisdiction under the Optional Protocol. In that case, the United States obtained a favorable judgment ordering Iranian compliance with the Vienna Convention. *United States Diplomatic and Consular Staff in Tehran* (*U.S. v. Iran*) (May 24), 1980 I.C.J. 3, ¶ 95 (emphasis added) [hereinafter "*Diplomatic and Consular Staff*"]. When Iran failed to comply with the judgment, the United States condemned Iran's "contempt" of the ICJ.[8] Adherence to the rule of law requires U.S. compliance with the Vienna Convention and *Avena*.

ARGUMENT

I. THE VIENNA CONVENTION AFFORDS VITAL PROTECTION TO INDIVIDUALS, INCLUDING U.S. CITIZENS, WHO TRAVEL OR RESIDE OUTSIDE THEIR HOME COUNTRY.

Although consular relations have existed since ancient times, the Vienna Convention provided the first multilateral codification of a consular system. Member states established the Convention to "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems." Vienna Convention, Preamble. The United States Senate unanimously ratified the Vienna Convention and the Optional Protocol on October 22, 1969. 115 Cong. Rec. S30, 953, S30, 997 (daily ed. Oct. 22, 1969). The hearings on ratifying the Convention record the Senate's understanding that the Convention would preempt any conflicting state or federal laws. *See* William J. Aceves,

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[7] *See* http://www.icj-cij.org/icjwww/idecisions.htm.

[8] *Muskie Issues a Plea on Hostages*, THE NEW YORK TIMES, Aug. 30, 1980, at A3.

The Vienna Convention On Consular Relations: A Study Of Rights, Wrongs, And Remedies, 31 VAND. J. TRANSNAT'L L. 257, 267-68 (1998). J. Edward Lyerly, the Deputy Legal Advisor for the Nixon Administration, testified before the Foreign Relations Committee that "'to the extent that there are conflicts in Federal legislation or state laws[,] the Vienna Convention, after ratification, would govern. . . .'" *Id.* at 268.

A. The Convention, including Article 36, codifies the consular system on which member nations rely to ensure their citizens' fair treatment when abroad.

The ICJ described consular relations' importance in its interim order in the Iran hostage-taking case:

> [T]he unimpeded conduct of consular relations, which have also been established between peoples since ancient times, is no less important in the context of present-day international law, in promoting the development of friendly relations among nations, and *ensuring the protection and assistance for aliens resident in the territories of other states.*

Diplomatic and Consular Staff, ¶ 40 (emphasis added). Article 5(e) of the Convention lists numerous consular functions and includes within that list the functions most pertinent to this case: "helping and assisting nationals, both individuals and bodies corporate, of the sending state."

To that end, the Convention recognizes the importance of consular communication in situations where authorities in one member country detain a national of another member country. In that event, Article 36(1) requires the detaining authorities to take each of the following steps: (1) permit communication between a consul and a detained national; (2) notify a detained person "without delay" of his or her right to speak with a consul; and (3) upon request, notify the consul of the national's detention. The State Department has recognized

on multiple occasions that notification serves an "essential" function in protecting nationals who travel to foreign countries. 7 FOREIGN AFFAIRS MANUAL § 411 (1984).[9]

> [O]ne of the basic functions of a consular officer is to provide a "cultural bridge" between the host community and the officer's own compatriots traveling or residing abroad. No one needs a cultural bridge more than the individual U.S. citizen who has been arrested in a foreign country or imprisoned in a foreign jail.

Id., § 401; *see* 7 FOREIGN AFFAIRS MANUAL § 410 (2004).[10] Article 36 exists to ensure that consular officials will have a real, not merely hypothetical, opportunity to act as a "cultural bridge" for their nationals. Detained individuals unschooled in foreign affairs matters often would not know to request communication with their consul. The Convention thus obligates states to notify persons of that right.

B. With proper notice, a consul can provide a detained national a wide array of assistance that can affect—and actually has affected—the outcome of criminal proceedings.

"Detained foreign nationals are inevitably distressed by the prospect of securing and preserving their rights in a legal system with whose institutions and rules they are not familiar." CONSULAR LAW at 145 (quoting U.S. DEP'T. OF STATE, TELEGRAM 40298 TO EMBASSY DAMASCUS, Feb. 21, 1975). "To minimize the disadvantages experienced by accused foreigners, international law guarantees the right of consular access." S. A. Shank & J. Quigley, *Foreigners on Texas's Death Row and the Right of Access to Consul*, 26 ST. MARY'S L.J. 719, 721 (1995). The Foreign Affairs Manual—

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[9] *Available at* http://web.archive.org/web/20040301104701/foia.state.gov/REGS/fams.asp? level=2&id=8&fam=0.

[10] *Available at* http://foia.state.gov/REGS/fams.asp?level=2&id=8&fam=0.

the State Department's own instructions to United States consular officers—recognizes the consul's role in helping a detainee understand the unfamiliar criminal-justice system that he or she must navigate. 7 FOREIGN AFFAIRS MANUAL §§ 400-426.2-1 (2004).

Consular assistance in navigating a foreign judicial system may take many forms. First, consular officials can help the detained national in selecting counsel, and in some cases, may even recruit pro bono counsel. The United States, Mexico, and the United Kingdom have specific guidelines for their consuls to assist nationals in obtaining counsel. CONSULAR LAW, at 125, 127 & 166. These published instructions typify the practices followed by many nations. In one case, Mexican consular officials in Houston helped secure *pro bono* representation after trial from the firm Vinson & Elkins for Ricardo Aldape, a Mexican national sentenced to death in Texas. The firm's efforts exposed intimidation and manipulation of witnesses "calculated to obtain a conviction" despite "the lack of evidence pointing to [Aldape's]" guilt. *Note: Reciprocity Unmasked: The Role of the Mexican Government in Defense of Its Foreign Nationals in United States Death Penalty Cases*, 20 ARIZ. J. INT'L & COMP. LAW 359, 372 (2003) (quoting *Guerra v. Collins*, 916 F. Supp. 2d 620, 637-38 (S.D. Tex. 1995)) [hereinafter "*Reciprocity Unmasked*"]. Aldape prevailed in habeas corpus proceedings, and prosecutors decided not to try him again, so he was released and returned to Mexico. "[T]he attorney that handled the case noted that 'without the Mexican consul's involvement, I have no doubt that [Aldape] would never have been released.'" *Id.* at 373-74. The Mexican government also participated extensively in the case of Osbaldo Torres, one of the individuals covered by the *Avena* judgment. As discussed in Medellin's Petition, the Oklahoma Court of Criminal Appeals stayed Torres's execution and remanded the case for an evidentiary hearing to determine the Article 36 violation's effect in that case. Medellin Petition, at 25-26,

142A-163A. The Mexican government took many actions to assist Torres: Mexico's ambassador to the United States spoke at Torres's clemency hearing, Mexico filed an *amicus* brief in the Oklahoma Court of Criminal Appeals, and Mexican President Vicente Fox personally urged Oklahoma Governor Brad Henry to delay the execution.[11] Governor Henry ultimately commuted Torres's sentence to life in prison.[12]

Second, prior to trial, consular officials may address the prosecuting authorities regarding the case. In capital cases, this may include presenting reasons for the prosecutor not to seek the death penalty, such as mitigating evidence, criminal history (or lack thereof), and the accused's personal circumstances. Missing the chance to present this evidence, which may be located in the home country and thus inaccessible to domestic counsel, significantly increases the foreign national's chance of a death sentence because prosecutors more often than not will decide against seeking the death penalty when faced with substantial mitigating evidence. Shank & Quigley, at 740; *see also McKleskey v. Kemp*, 481 U.S. 279, 307 n.28 (1987) ("[T]he strength of the available evidence . . . may influence a prosecutor's decision to offer a plea bargain or go to trial.").

Third, the consul may help collect evidence for use at trial and, in death-penalty cases, during the penalty phase. Because mitigating evidence may exist in the national's home country rather than in the place of the trial, consuls can provide invaluable assistance in collecting that evidence. *See*

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[11] Associated Press, *Death Penalty Opponents Urge Clemency for Torres*, May 12, 2004, *available at* http://ocadp.org/news/2004/torres/opponents_urge.html.

[12] Mexican Secreteriat of Foreign Relations, Press Release No. 106, *Osvaldo Torres' Execution in Oklahoma is Suspended, available at* http://www.sre.gob.mx/eua/English/Press/Release/2004/May/SRETorresCourt.pdf.

Reciprocity Unmasked, at 368 (describing how Mexican officials collected evidence of a defendant's diminished mental capacity from his home town and with that evidence, helped reduce his sentence from death to life in prison); *Note: Strangers in a Strange Land: Assessing the Fate of Foreign Nationals Arrested in the United States by State and Local Authorities*, 78 MINN. L. REV. 771, 772-73 n.6 (1994) (referring to guidelines requiring a Canadian consul "to obtain case related information" on behalf of charged nationals).

Fourth, consuls monitor proceedings involving their nationals as a matter of course to ensure fairness and compliance with international standards. Several countries publish specific guidelines for this monitoring. The State Department's guidelines require its consuls to attend any U.S. national's trial, protest any discrimination, and monitor the well-being of incarcerated citizens. CONSULAR LAW, at 169-71 The United Kingdom requires its consuls "to intervene in judicial proceedings" in the event of a "prime-facie miscarriage or denial of justice" or "when appeal to a higher authority would obviously be futile." *Id.* at 125. The potential for discrimination against a foreign national makes consular monitoring particularly important in capital cases. Shank & Quigley, at 741.

Furthermore, consuls can provide assistance beyond the four major categories listed here. For instance, Mexico historically has actively assisted its nationals in U.S. criminal proceedings and in 2000 formed the Mexican Capital Legal Assistance Program. *See Reciprocity Unmasked*, at 393-94. As described above, Mexico's intervention resulted in the outright release of Ricardo Aldape and averted death sentences in three other Mexican nationals' cases. *Id.* at 368-74. None of this vital assistance can occur absent compliance with Article 36 of the Vienna Convention.

II. THE CONTINUED VIABILITY OF ARTICLE 36 DEPENDS ON RECIPROCITY AMONG NATIONS.

This Court long ago recognized that "international law obligations are of necessity reciprocal in nature" and that "what is law for one is, under the same circumstances, law for the other." *United States v. Arjona*, 120 U.S. 479, 487 (1887). International law and United States' foreign-relations law follow the cardinal rule that treaties must be observed (*pacta sunt servanda*). RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §321 cmt. a. "[T]he doctrine of *pacta sunt servanda* . . . lies at the core of the law of international agreements and is perhaps the most important principle of international law." *Id.* "It includes the implication that international obligations survive restrictions imposed by domestic law." *Id.*; U.S. CONST. art. VI, c1. 2 (international treaties preempt conflicting state law under the Supremacy Clause). When one state fails to comply with its treaty obligation, it influences others to do the same. As Justice Brandeis observed, "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

A. The United States insists on Article 36's protections for its nationals abroad.

Beginning with the Vienna Convention itself, the United States historically has recognized the importance of Article 36, a position that makes the United States' reciprocal compliance with Article 36 particularly critical. At the Vienna Convention, the U.S. delegation stated that "no country could disregard its obligation in certain circumstances to inform consuls of the sending state of the arrest of its nationals." LUKE T. LEE, VIENNA CONVENTION ON CONSULAR RELATIONS 111 (1966). Indeed, it was the United States, along with several other countries, that sponsored the

amendment that ultimately became Article 36. *Id.* at 113. The Unites States has taken the position that Article 36 created "'[o]bligations of the highest order'" that require notification "as quickly as possible and, in any event, no later than the passage of *a few days.*" ARTHUR W. ROVINE, DEP'T. OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 161 (1973) (emphasis added).

The United States' insistence on consular notice has extended to specific cases involving its nationals in other countries. When the Syrian government detained two American citizens, the State Department chastised it for failing to provide consular notice in accordance with bilateral treaties and customary international law:

> The right of governments, through their consular officials, to be informed promptly of the detention of their nationals in foreign states, and to be allowed prompt access to those nationals, is well established in the practice of civilized nations . . . .

CONSULAR LAW, at 145 (quoting TELEGRAM 40298). The same document emphasized the importance of reciprocity: "The recognition of these rights is prompted in part by considerations of reciprocity. . . . The Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to these nationals." *Id.*

The State Department also protested the alleged violation of Article 36 by foreign authorities who detained two Americans, even though the authorities released the Americans after 32 hours. The United States considered the principle of complying with Article 36 so important that it actually lodged the protest *after* release, asking a senior minister of the detaining country to "elaborate expeditiously" as to "[w]hy the . . . two United States citizens were not

informed of their right to contact the Consulate as provided under [A]rticle 36 of the Vienna Convention on Consular Relations of 1963; and why the Consulate was not officially informed of the detention of two United States Citizens until approximately 28 hours afterward." CONSULAR LAW, at 149. In that instance, the detaining authorities released the individuals in less than two days and gave notice to the U.S. consulate. In contrast to that relatively rapid action, Texas arrested, tried, convicted, and sentenced 18-year-old Medellin to death, and then allowed him to remain on death row during appellate proceedings, without ever notifying the Mexican consulate or telling Medellin that he had the right to contact the consulate. Medellin learned about his right to contact the consulate four years after his arrest, when he was already on death row.

The State Department's actions and statements leave no doubt about the importance that the United States places on rapid consular notification when foreign authorities detain Americans. In fact, the State Department *requires* consular officials to lodge a protest if detaining authorities do not notify the consul within 72 hours. 7 FOREIGN AFFAIRS MANUAL § 426.2-1 (2004). But, as the State Department has also recognized, the United States can expect swift notification only in an environment of reciprocity.

B. Texas's treaty violation has international repercussions.

Texas's treaty violation in Medellin's case and the courts' failure to provide a remedy for that violation create a dangerous legal precedent, particularly because those failures fit an ongoing pattern of violations by Texas and other states.[13] Other nations may follow the United States' practice by disregarding Article 36's notice requirement and by failing to

[13] *See Avena*, ¶ 106 (listing 51 cases in which various U.S. jurisdictions violated Article 36).

offer any remedy for its violation. The State Department's own instructions to U.S. law-enforcement authorities regarding consular notification recognize this danger:

> The Department of State appreciates the continued cooperation of federal, state, and local law enforcement agencies in helping to ensure that foreign nationals in the United States are treated in accordance with these instructions. *Such treatment will permit the United States to comply with its consular legal obligations domestically and to continue to expect rigorous compliance by foreign governments with respect to United States citizens abroad.*

U.S. DEP'T. OF STATE, CONSULAR NOTIFICATION AND ACCESS 13 (2003) (emphasis added).[14] Reciprocity provides the underpinning for Article 36 and international law generally. To benefit from Article 36 when its citizens travel abroad, the United States must adhere to it domestically.

III. THE UNITED STATES MUST FOLLOW THE ICJ'S *AVENA* JUDGMENT, WHICH SPECIFICALLY ADDRESSES THE MEDELLIN CASE.

The United States has adopted the Optional Protocol, which makes the ICJ the authoritative interpreter of the Vienna Convention and gives the ICJ compulsory jurisdiction over any disputes involving the Convention. Optional Protocol, Art. 1. Mexico invoked that jurisdiction in the *Avena* case to resolve its claims against the United States for violating Article 36 in 54 specific instances, including Medellin's case. The ICJ issued a judgment that requires judicial review of Medellin's case to determine whether Texas's treaty violation prejudiced Medellin's defense. *Avena*, ¶¶ 121, 139. Under the Optional Protocol, the ICJ's decision binds U.S. courts, which must conduct the review ordered in *Avena*.

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[14] *Available at* http://travel.state.gov/law/CNA_book.pdf.

A. The United States proposed, advocated for, and joined the Optional Protocol, which establishes the ICJ as authoritative interpreter of the Convention.

The Optional Protocol provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol." Optional Protocol, Art. 1. International law and United States foreign-relations law require domestic courts to follow the Optional Protocol's plain text and to accept the ICJ's interpretations as binding. RESTATEMENT, § 321 cmt. a. These obligations bind not only the national government, but also any political subdivisions, including the states. *See* Aceves, at 267-68. The U.S. Constitution's Supremacy Clause codifies this principle into domestic law by giving preemptive force to ratified treaties. U.S. CONST., art. VI, cl. 2; *Wildenhus's Case*, 120 U.S. 1, 17 (1887).

The United States understood the Optional Protocol's unambiguous terms when it adopted the Protocol. The United States proposed the original text that, in modified form, became Article 1 of the Optional Protocol. *See* Report of the United States Delegation to the Vienna Conference on Consular Relations, *reprinted in* Sen. Exec. Doc. E, 91st Cong., 1st Sess., May 8, 1969, at pp. 72-73. And the United States acted as one of the Optional Protocol's strongest advocates at the Vienna Convention, successfully defeating any efforts to diminish the compulsory jurisdiction that the Protocol conferred on the ICJ. *Id.* By adopting the Optional Protocol, the federal government made it "part of the Supreme law of the United States," and Texas must therefore give the Protocol "force and effect." *Wildenhus's Case*, 120 U.S. at 17. As Oklahoma Court of Criminal Appeals Justice

Charles Chapel noted in his *Torres* concurrence: "The United States is bound by the terms of the treaty and the State of Oklahoma is obligated by virtue of the Supremacy Clause to give effect to the treaty." Medellin Petition, at 150A.

B. *Avena* requires U.S. courts to review—without resorting to procedural default doctrines—the effect that Texas's treaty violation had on Medellin's defense.

Mexico's application instituted ICJ proceedings against the United States under the Optional Protocol for "violations of the Vienna Convention on Consular Relations," in connection with the cases of 54 Mexican nationals, including Medellin. *Avena*, ¶ 1. In addition to seeking declarations that denying consular notice under Article 36 violated international law, Mexico asked the ICJ for relief that would "restore the *status quo ante*, that is, re-establish the situation that existed before the detention of, proceedings against, and convictions and sentences of, Mexico's nationals in violation of the United States' international legal obligations." *Id.*, ¶ 14(5). The United States participated fully in the *Avena* proceedings.

When it reached the merits, the ICJ determined that local authorities in the United States had violated Article 36 in 51 cases, including Medellin's case. *Id.*, ¶¶ 106, 114. But the ICJ did not order the *status quo* restoration sought by Mexico. Rather, the ICJ ordered a more limited remedy, requiring judicial review and reconsideration of the Mexican nationals' sentences by "tak[ing] account of the violation of the rights set forth in the Convention and guarantee[ing] that the violation and the possible prejudice caused by that violation will be fully examined." *Id.*, ¶ 138 (citations omitted). The ICJ judgment precludes application of "procedural default" as a bar to substantive review and requires "review and reconsideration . . . both of the sentence and of the conviction." *Id.*, ¶¶ 131-39. "[W]hat is crucial in the review and reconsideration process is the existence of a procedure

which guarantees that full weight is given to violation of the rights set forth in the Vienna Convention . . . ." *Id.*, ¶ 139. Because the *Avena* judgment directly addresses Medellin's case, the Optional Protocol binds U.S. courts to follow that judgment.

The full consideration and U.S. participation that preceded the ICJ's issuing its *Avena* decision distinguishes this case's circumstances from this Court's earlier decisions in *Federal Republic of Germany v. United States*, 526 U.S. 111 (1999) (*per curiam*) and *Breard v. Greene*, 523 U.S. 371 (1998) (*per curiam*). In those instances, Germany and Paraguay had filed ICJ actions just days or hours before scheduled executions and then asked this Court to stop those executions based on provisional stay orders that the ICJ issued immediately after the cases were filed. *Federal Republic of Germany*, 526 U.S. at 111-12; *Breard*, 523 U.S. at 374. In both instances, this Court made particular note of the tardiness in seeking relief, and the United States contended that the ICJ's provisional orders were not binding. *See* William J. Aceves, *International Decision: Case Concerning the Vienna Convention on Consular Relations (Federal Republic of Germany v. United States)*, 93 AM. J. INT'L L. 924, 926 n.16 (1999). In Medellin's case, the plea is not tardy, because the ICJ decided *Avena* long before his scheduled execution and he raised *Avena* as grounds for relief in the Court of Appeals. *Medellin v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004).[15] Unlike the ICJ orders at issue in *Federal Republic of Germany* and *Breard*, the United States has never argued that the ICJ's final judgment in *Avena* is not binding. Denying Medellin the remedy ordered in *Avena*—substantive review of the effect

[15] Although the ICJ had not yet issued its *Avena* decision at the time, Medellin raised the Texas authorities' Vienna Convention violation as a ground for relief in the district court, citing the ICJ's final decision in the case that was the basis for this Court's decision in *Federal Republic of Germany*. *Id.*

that Texas's treaty violation had upon his defense—would amount to contumacy of a fully considered ICJ judgment and would compound the original international-law violation that occurred when Texas authorities violated Article 36. *See* Frederic L. Kirgis, *Restitution as a Remedy in U.S. Courts for Violations of International Law*, 95 AM. J. INT'L L. 341, 343 (2001) ("International law includes not only norms regarding substantive conduct, but also binding remedial norms. The remedial norms are important.").

C. The United Nations Charter requires the United States to comply with ICJ judgments.

The United States Senate has ratified the United Nations charter, a multilateral treaty. Charter of the United Nations, June 26, 1945, 59 Stat. 1031 [hereinafter "U.N. Charter"]. The U.N. Charter establishes the ICJ as the United Nations' "principal judicial organ," and "each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." U.N. Charter, Art. 92, 94. By adopting Article 94 of the U.N. Charter, the United States has "transferr[ed] adjudicatory authority to the U.N. and its organs," and attributes "binding legal force to their decisions." Sanja Djajic, *The Effect of International Court of Justice Decisions on Municipal Courts in the United States: Breard v. Greene*, 23 HASTINGS INT'L & COMP. L. REV. 27, 50 (1999). Like the Optional Protocol, the U.N. Charter requires the United States to comply with *Avena*.

CONCLUSION

Medellin's petition for certiorari presents questions of urgent national and international importance. The United States relies on Vienna Convention Article 36 to protect its nationals in foreign countries, but the continued viability of Article 36 depends on reciprocal adherence to its mandates. A pattern of denying consular notification has emerged in local U.S. jurisdictions, and only a judicial remedy for those

violations can ensure continuing compliance with Article 36 around the world. Moreover, the ICJ, which had compulsory jurisdiction over Mexico's claim against the United States for violating Article 36, issued an order requiring U.S. courts to review the violation in Medellin's case to determine the effect it had on his defense. Compliance with the ICJ's judgment will reinforce the rule of law, which the United States so forcefully advocates around the world.

For all the reasons stated in the Brief, this Court should grant Medellin's Petition.

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